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In the Supreme Court of the United States

OCTOBER TERM, 1976

E. I. DUPONT DE NEMOURS AND COMPANY, ET AL., PETITIONERS

v.

RUSSELL E. TRAIN, AS ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

RUSSELL E. TRAIN, AS ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

E. I. DUPONT DE NEMOURS AND COMPANY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

ROBERT H. BORK,
Solicitor General,
PETER R. TAFT,
Assistant Attorney General,
DANIEL M. FRIEDMAN,
Deputy Solicitor General,
HOWARD E. SHAPIRO,
Assistant to the Solicitor General,
EDMUND B. CLARK,
KATHRYN A. OBERLY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

G. WILLIAM FRICK,
General Counsel,
ALAN W. ECKERT,
Deputy Associate General Counsel,
Environmental Protection Agency,
Washington, D.C. 20460.

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OPINION BELOW

The opinion of the court of appeals (A. 253–286)[1] is not yet officially reported.

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[1] "A." refers to the Appendix in No. 75–978. "App. Br." refers to the separate Appendices to Petitioner's Brief in No. 75–978.

JURISDICTION

The judgment of the court of appeals (A. 287–289) was entered on March 10, 1976. The petition for a writ of certiorari in No. 75–1473 was filed on April 13, 1976, and in No. 75–1705 on May 24, 1976. The petitions were granted on June 21, 1976 (A. 291, 292).[2] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

This brief discusses the following question:

Whether federal standards of performance promulgated under Section 306 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. V) 1316, to control effluent discharges from sources constructed after the date of proposal of the standards, are only "presumptively applicable" and must provide an "escape mechanism" enabling individual new sources to obtain a variance from the standards.[3]

[2] The court of appeals decided this case in two steps. The first decision (A. 240–251) ("*duPont I*") held only that the court of appeals rather than the district court had jurisdiction to review the actions of the Administrator of the Environmental Protection Agency challenged in No. 75–978. The second decision ("*duPont II*") decided the merits of petitioners' challenges (A. 253–286). The chemical companies, petitioners in both cases (Nos. 75–978, *duPont I;* No. 75–1473, *duPont II*) raised the jurisdictional and the substantive issues in both petitions. The government filed a cross-petition in *duPont II* (No. 75–1705), raising an additional question on the merits.

In granting the petition in *duPont I* and the petition and cross-petition in *duPont II*, the Court consolidated the petition and cross-petition in *duPont II*, and ordered that *duPont II* be argued *in tandem* with *duPont I* (A. 291, 292), but did not consolidate *duPont I* and *duPont II*.

The parties agreed that their opening briefs in *duPont I* would discuss both the jurisdictional and the substantive issues. The briefs in the consolidated cases (Nos. 75–1473 and 75–1705, *duPont II*) discuss only the issue raised by the government's petition in No. 75–1705.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. (Supp. V) 1251 *et seq.*, and Environmental Protection Agency regulations establishing general provisions for effluent limitations, 40 C.F.R. Part 401, and effluent limitations for the inorganic chemicals manufacturing point source category, 40 C.F.R. Part 415, are reproduced in the separate appendices to petitioners' brief in No. 75–978 (App. Br. 1a–42a, 1b–79b, 1c–9c).

STATEMENT

This case involves the Environmental Protection Agency's regulations for "new source" standards of performance for the inorganic chemicals manufactur-

[3] The questions duPont, *et al.*, present in No. 75–1473 are the same ones they present in No. 75–978. See note 2, *supra*. The questions involve the authority of the Administrator of the Environmental Protection Agency to establish effluent limitations for pollutants under Section 301(b) of the Act, and the jurisdiction of the courts of appeals to review both those limitations and the Administrator's guidelines for effluent limitations promulgated under Section 304(b), upon which the limitations are based. The Administrator's arguments on those issues are set forth in his brief in No. 75–978.

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ing industry, established under Section 306 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. (Supp. V) 1316. The Administrator's brief in No. 75-978 describes in some detail the statutory scheme, many of the provisions involved and the proceedings in the present case. We discuss here only the statutory provisions and the administrative and judicial proceedings insofar as they relate to new sources of pollution.

1. *The pertinent statutory provisions.* Section 306 (a)(2) defines a "new source" as "any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section." Section 306(a)(3) defines "source" as "any building, structure, facility, or installation from which there is or may be the discharge of pollutants."

Section 306(b)(1)(A) directs the Administrator to publish, within 90 days after passage of the Act, a list of categories of industries for which new source standards are to be established: it lists 27 industries for which those standards are required, including the inorganic chemicals manufacturing industry. The Administrator published the list, including the inorganic chemicals manufacturing category, on January 16, 1973, 38 Fed. Reg. 1624.

Section 306(b)(1)(B) requires the Administrator to "publish regulations establishing Federal standards of performance for new sources within [the categories on the list published under subsection b(1)(A)]." Section 306(a)(1) provides that those standards must reflect:

> the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

In establishing the standards, the Administrator may "distinguish among classes, types, and sizes" (Section 306(b)(2)) within the general industrial categories and is required to consider three factors in establishing the standards: (1) the cost of achieving the effluent reduction, (2) non-water quality environmental impacts, and (3) energy requirements. Section 306(b)(1)(B).

Once new source standards are effective, it is "unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source." Section 306(e), 33 U.S.C. (Supp. V) 1316(e).

Section 306(d) provides that no more stringent standard may be imposed on plants that are constructed in compliance with these standards of performance for the 10 years following their completion.[4]

[4] If the plant is depreciated or amortized on the accelerated method permitted under Sections 167 and 169 of the Internal Revenue Code (26 U.S.C.), the prohibition against imposition of a more stringent standard applies during the period of such depreciation or amortization.

2. *The facts of this case.* The Administrator promulgated new source standards under Section 306 for the inorganic chemicals manufacturing industry in the same proceeding as the effluent limitations for existing sources described in the Administrator's brief in No. 75-978. See, *e.g.*, 40 C.F.R. 415.65, 415.75, 415.85 (Br. App. 35b, 39b, 43b). See Resp. Br., No. 75-978, pp. 13-21.[5] Within the 90 days allowed by Section 509(b)(1), 33 U.S.C. (Supp. V) 1369(b)(1), 15 firms manufacturing inorganic chemicals (Pet. Br., Nos. 75-1473 and 75-1705, p. 1, n. 1) sought review of the standards in the United States Court of Appeals for the Fourth Circuit. The case involving the new source standards was briefed and argued simultaneously with that involving the industry's challenges to the existing source regulations.[6]

The court of appeals held, with respect to both existing and new source regulations, that they are "presumptively applicable," but that any particular plant may rebut the presumption as applied to it (A. 262).[7] The court noted that both the Act and the

[5] The regulations were published in proposed form on October 11, 1973, 38 Fed. Reg. 28174 *et seq.* After a comment period, the regulations were promulgated in final form on March 12, 1974. 39 Fed. Reg. 9612 *et seq.*; 40 C.F.R. Part 415.

[6] While the parties are in disagreement over the proper forum—the district courts or the courts of appeals—to review challenges to the existing source regulations, they agree that jurisdiction to review the new source regulations is exclusively in the court of appeals, under Section 509(b)(1)(E).

[7] The regulations establishing effluent limitations for existing sources, *e.g.*, 40 C.F.R. 415.62, 415.72, 415.82 (App. Br. 31b, 37b, 40b), reflect a two-step program under Section 301(b), 33 U.S.C. (Supp. V) 1311(b). By 1977, existing sources must achieve compliance with effluent limitations based on "application of the best practicable control technology currently available." By 1983, existing sources must comply with effluent limitations requiring "application of the best available technology economically achievable." The Administrator may modify the 1983 level limitations for a particular "existing source" if such modification "(1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." Section 301(c). The Administrator provided by regulation a similar variance from the 1977 level limitations. The owner or operator of a particular "existing source" seeking a variance for 1977 must demonstrate that there are factors affecting his ability to meet the limitations that are "fundamentally different" from the factors considered by the Administrator in promulgating the regulations. See, *e.g.*, 40 C.F.R. 415.62, 415.72, 415.82. See also Resp. Br. No. 75-978 at p. 57.

Administrator's regulations allow individual plants to obtain variances from the *existing* source regulations if they satisfy certain conditions (*ibid.*). See n. 7, *supra*. Although neither the Act nor the regulations expressly authorize variances for new sources, and the industry did not claim that it is entitled to them, the court of appeals nevertheless held that its rule of "presumptive applicability applies to new sources as well as existing sources," and directed the Administrator to "come forward with some limited escape mechanism for new sources" (A. 263). The Administrator's petition challenges only the part of the court of appeals' remand order that requires the Administrator to provide an "escape mechanism" for new sources.

SUMMARY OF ARGUMENT

The language and statutory scheme of the Federal Water Pollution Control Act Amendments of 1972,

as well as the Amendments' legislative history, show that Congress did not require the Administrator to establish "a limited escape mechanism" for plants to be built after he establishes effluent limitations ("federal standards of performance") for new sources under Section 306. The absence of such a requirement from Section 306 is itself convincing evidence that such a variance procedure is not mandatory, especially when contrasted with provisions that allow, but do not require, the Administrator to grant variances in other contexts. See, *e.g.*, Section 301(c), governing variances from the 1983 level of effluent limitations for existing sources.

There is no reason to provide an "escape mechanism" for plants not yet constructed. In the case of existing sources, a particular plant may face unique circumstances not considered by the Administrator in promulgating regulations of general applicability. A new plant, however, can be designed and equipped to utilize from its inception the best available pollution control technology, as Congress provided in Section 306. Thus, new sources must be built to comply with new source standards, or not be built at all. Indeed, Congress rejected a provision providing for even limited variances from the new source standards. It insisted upon rigorous uniform standards so that plants would use the best available demonstrated control technology no matter where located, and would not be encouraged to migrate to jurisdictions with less stringent requirements.

To the extent that flexibility is required in new source standards, Congress provided for it by author-

izing the Administrator to vary the standards by distinguishing among the subcategories of the industry on the basis of differences reflecting products, processes, scale of operation, etc. The Administrator's regulations make these distinctions.

Petitioners' contention that the national standards established by the Administrator may be varied in individual permit proceedings does not follow either from the enforcement provisions of the Act (Sections 306(e), 309 and 505) or from Section 402(k), which provides that, for enforcement purposes, compliance with a permit is deemed compliance with Section 306. Direct enforcement of new source standards was necessary to deal with the case in which a new source began operation without first obtaining a permit. The purpose of Section 402(k) is simply to insure that, once a point source has obtained a permit, subsequent changes in effluent limitations will not place the permit holder in violation of the Act.

ARGUMENT

THE FEDERAL WATER POLLUTION CONTROL ACT DOES NOT REQUIRE VARIANCES FROM THE ADMINISTRATOR'S STANDARDS OF PERFORMANCE FOR NEW SOURCES

A. THE LANGUAGE AND STATUTORY SCHEME SHOW THAT CONGRESS DID NOT INTEND TO REQUIRE ANY VARIANCES FROM THE ADMINISTRATOR'S NEW SOURCE STANDARDS

Section 306(b) of the Act requires the Administrator to establish "Federal standards of performance for new sources within" each industrial category (including 27 mandatory ones) for which he determines to establish such standards. "Standard of per-

formance" is defined as "a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants" (Section 306 (a)(1)). In establishing standards of performance, the Administrator is required to consider "the cost of achieving such effluent reduction, and any nonwater quality environmental impact and energy requirements" (Section 306(b)(1)(B)).

Section 306(e) makes it unlawful, after those standards of performance have been established, "for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source."

Under the Act, "it is unlawful for any person to discharge a pollutant without obtaining a permit and complying with its terms" (*Environmental Protection Agency* v. *California ex rel. State Water Resources Control Board,* No. 74–1435, decided June 7, 1976, slip op. 4–5). Section 402(a)(1) and (b)(1)(A) require that all permits insure that the discharge of pollutants they sanction will meet all "applicable requirements under sections * * * 306 * * *."

There is nothing in either Section 306 or Section 402 which indicates, or even suggests, that Congress did not intend what it said—that new sources are to operate in compliance with the Administrator's stand-

ards of performance. There is no indication that Congress intended to make those standards only "presumptively applicable" or to require a "limited escape mechanism" (A. 262, 263) which the Administrator must provide to permit exceptions to the standards to meet the problems of particular plants.[8]

The absence from Section 306 of any requirement that the Administrator provide variances or exceptions for individual point sources is in sharp contrast to other sections of the Act that expressly permit such waivers.[9] For example, Section 301(c) permits the Administrator to "modify the requirements" established under Section 301(b)(2)(A) for effluent limitations to be achieved by July 1983 for "any point source for which a permit application is filed after July 1, 1977," if he finds that "such modified requirements

[8] No other court of appeals that has considered the new sources standards has adopted this requirement. See *Hooker Chemical and Plastics Corp.* v. *Train*, 537 F. 2d 639 (C.A. 2); *American Iron & Steel Institute* v. *Environmental Protection Agency*, 526 F. 2d 1027, 1057–1060 (C.A. 3); *CPC International, Inc.* v. *Train*, 515 F. 2d 1032, 1043–1051 (C.A. 8). Cf. *American Frozen Food Institute* v. *Train*, C.A.D.C., No. 74–1464, decided May 11, 1976. The District of Columbia Circuit's approval of new source regulations in the latter case is less clear, because that court mistakenly assumed that the Environmental Protection Agency had provided by regulation for a variance applicable to the new source standards, as well as 1977 and 1983 existing source regulations (slip op. 68). In fact, however, the variance regulation is applicable only to the 1977 existing source regulations. See n. 7, *supra*, p. 6.

[9] There is a clear distinction between the court of appeals' holding that the Administrator must provide a variance procedure for new sources, and the general rule that agencies may provide for such variances. See, *e.g.*, *Federal Power Commission* v. *Texaco*, 377 U.S. 33, 40–41; *Permian Basin Area Rate Cases*, 390 U.S. 747, 770–

(1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants." Similarly, Section 402(d)(3) authorizes the Administrator to "waive" "as to any permit application" the requirement in Section 402(d)(2) that a state cannot issue a permit if he notifies it of his objection; and Section 402(e) authorizes the Administrator, for any category of point sources, "to waive the requirements" of Section 402(d) that the state transmit to him copies of all permit applications.

The congressional intent not to require variances from the standards for new sources is further shown by Section 313 of the Amendments, 33 U.S.C. (Supp. V) 1323. That section authorizes the President, whenever he determines it to be in the paramount interest of the United States, to grant any federal facility a one-year extendable exemption from any state or federal water pollution control requirement. The President, however, may not grant an exemption "from the requirements of section 306 or 307 [governing toxic pollutants] of this Act." See *Environmental Protection Agency* v. *California ex rel. State Water Re-*

772. The Administrator has interpreted the statute as permitting but not requiring variances for existing sources. His regulations provide that he will grant a variance from effluent limitations for 1977 for existing sources when a discharger shows that "factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines" (see n. 7, *supra*, p. 6; *e.g.*, 40 C.F.R. 415.62, 415.72, 415.82). This provision was sustained in *Natural Resources Defense Council* v. *Environmental Protection Agency*, 537 F. 2d 642 (C.A. 2).

sources Control Board, No. 74–1435, decided June 7, 1976, slip op. 11–12, n. 23. If Congress did not permit the President to grant an exemption from the requirements of Section 306 for federal facilities, even where he determined that such exemption would be in the paramount interest of the United States, it certainly did not require the Administrator to grant exemptions from those requirements for non-federal sources of pollution on some less stringent basis.

The congressional determination to permit individual variances from effluent limitations for existing sources, but not for new sources, reflects significant differences between the two categories. An existing facility may have unique problems stemming from its particular technology, operating methods or equipment, that the Administrator could not consider in promulgating general standards for the entire industry. Variances are necessary to ensure that application of the general standards to existing plants that have those unique problems will not subject them to requirements which are demonstrably inappropriate for the particular facility. To impose such ironclad standards upon them would be unfair. It would also contravene the congressional intent to achieve, by 1977 and 1983, effluent limitations that shall require application of "the best practicable control technology currently available" and "the best available technology economically achievable," respectively.

No similar problem exists for new sources. Since those facilities have not yet been constructed, the

application of uniform standards to them cannot require them to make any changes in their existing technology, operations or property. Moreover, as Senator Muskie noted, in explaining the Conference Report on the bill to the Senate, "pollution control alternatives are available to a new source, which are not available to existing sources." Leg. Hist. 172.[10] A new plant can be designed and equipped to utilize from its inception the best available pollution control technology.

As we show in Point B below, Congress intended new sources of pollution to meet the exacting effluent limitations that the Administrator would promulgate for them. The standard Congress hoped to achieve for new sources was one "permitting no discharge of pollutants" (Section 306(a)(1)). The most effective way to accomplish that objective was by prohibiting any new source that did not meet those standards. That is precisely what Congress did when it required the Administrator to establish "Federal standards of performance for new sources within [each individual] category" he had established (Section 306 (b)(1)(B)), and made it unlawful "for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source" (Section 306(e)).

[10] Committee Print, A Legislative History of the Water Pollution Control Act Amendments of 1972, 93d Cong., 1st Sess. (1973) (2 vols.) hereafter cited as Leg. Hist.).

B. The Legislative History of the 1972 Amendments Shows That Congress Intended the Federal Standards of Performance for New Sources To Be Uniform Within a Particular Industrial Class or Category and Therefore Not Subject to Variances for Particular Facilities

The legislative history of the 1972 Amendments shows that Congress recognized that the only effective way to reduce and ultimately to end pollution by new sources was to require all of them to meet the exacting standards that the Administrator would promulgate. As the House Committee Report on the bill stated (H.R. Rep. No. 92–911, 92d Cong., 2d Sess. 110 (1972); Leg. Hist. 797):

> In section 306, the Committee recognizes two of the most significant factors in the attainment of clean water. These factors are (1) the need to *preclude the construction of new sources* or the modification of existing sources *which use less than the best available control technology* for the reduction or elimination of the discharge of pollutants, and (2) the recognition of the significantly lower expense of attaining a given level of effluent control in a new facility as compared to the future cost of retrofitting a facility to meet stringent water pollution control measures. [Emphasis added.]

The Senate Committee Report similarly pointed out (S. Rep. No. 92–414, 92d Cong., 1st Sess. 58 (1971); Leg. Hist. 1476) that "maximum feasible control of new sources, at the time of their construction, is considered by the Committee to be the most effective and,

in the long run, the least expensive approach to pollution control." It stated (*id.* at 57–58; Leg. Hist. 1475–1476):

> the standards of performance for new source[s] * * * would require the achievement of the greatest degree of pollution reduction that can be achieved through the application of the best available effluent control technology * * *. Such a maximum use of available means to prevent and control water pollution is essential to the prevention of new pollution problems and the eventual attainment of the goal of no-discharge.

Congress also insisted upon rigorous uniform standards for new sources to prevent the weakening of pollution controls that would result if firms sought to avoid stringent limitations in one state by constructing new facilities in another state whose limitations were less exacting. As Congressman Clausen, a member of the House Committee, explained (Leg. Hist. 379):

> I have heard it said that H.R. 11896 would allow the industrial equivalent of legal forum shopping. This is ridiculous. If, for example, a factory in the State of Washington decided because of stringent water quality requirements in the State of Washington to move their factory to some other State, this would place the new factory under the requirements of section 306 for new sources. Thus, not only would the plant in the new location be required to meet local water quality standards but it would also have to meet new source performance standards which would be consistent with "best available

> demonstrated technology." You might say this would be like moving from the frying pan into the fire.

Another Committee member, Congressman Roe, stressed the same point (Leg. Hist. 579–580):

> Section 306 requires that new sources of water pollution be constructed to meet a standard that reflects the greatest degree of effluent reductions that can be achieved by the use of the best available, demonstrated control technology. If practicable, the standard would permit no discharge of pollutants. Each new plant or modification of an existing plant will be required to follow this standard. In other words, what we are saying is that if an industry threatens to leave an area because of its stringent requirements, it would be confronted with the requirement of meeting the 1981 goal immediately.

See also Leg. Hist. 263 and 1405.

Indeed, Congress rejected a provision providing for limited variances from the new source standards. The bills reported to both Houses contained a provision requiring the Administrator to grant a variance for any source that, as a result of modification, would be subject to the new source standards, upon finding that "the economic and social costs of implementing such standard bear no reasonable relationship to the social and economic benefits * * *." If he so found, the Administrator would have been required to adjust the standard for such source to "reflect the greatest degree of effluent reduction which the Administrator determines can reasonably be achieved by such

source."[11] This provision would have covered only those existing sources that became subject to the new source standards because of modification, and not new sources generally.

Congress, however, was unwilling to permit even this limited variance from new source standards; the provision was deleted in conference without explanation. Leg. Hist. 173. "[I]ts action strongly militates against a judgment that Congress intended a result that it expressly declined to enact." *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200. Cf. *Train* v. *Colorado Public Interest Research Group, Inc.*, No. 74–1270, decided June 1, 1976, slip op. 15–20.[12]

[11] The full text of this provision, which was identical in the House and Senate bills, is as follows (Leg. Hist. at 993, 1626–1627):

"(C) Such standards of performance shall apply to all sources within such category, unless, upon application from an owner or operator of any source which as a result of modification is subject to this section, the Administrator determines, after public hearing, that the economic and social costs of implementing such standard bear no reasonable relationship to the social and economic benefits (including water quality objectives) to be obtained. Any such determination shall be accompanied by an appropriate adjustment of such standard for such source, which shall reflect the greatest degree of effluent reduction which the Administrator determines can reasonably be achieved by such source."

[12] The cases the Fourth Circuit cited (A. 263) do not support its conclusion that variance provisions are mandatory. *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, upheld a provision of the car-service rules established by the Interstate Commerce Commission permitting exemptions from the requirements of the regulations. The provision was sustained under the "well established" principle that "an agency's authority to proceed in a complex area such as car-service regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances" (*id.* at 755). The Court did not suggest, however, that the Commission could have been required to provide such exemptions; it merely sustained the agency's discretionary authority to do so. *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F. 2d 375, 398–399 (C.A.D.C.), held only that regulations that cannot be met on a continual basis by a properly designed and operated source of pollution must provide some method to avoid the dilemma. That ruling, however, does not establish that variances must be provided from standards which new sources are able to meet. See *International Harvester Co.* v. *Ruckelshaus*, 478 F. 2d 615, 641 (C.A. D.C.).

C. The Act and the Regulations Provide Any Necessary Flexibility in the New Source Standards To Reflect Differences in Operations and Facilities Within the Industry.

Congress recognized in the 1972 Amendments that new source standards must reflect the variations of technology and operating practices and procedures within an industry. It accomplished that objective, however, not by providing variances from the general standards for individual facilities, but by authorizing the Administrator, for the purpose of establishing "Federal standards of performance for new sources," to "distinguish among classes, types, and sizes within categories of new sources" (Section 306(b)(2)). As Congressman Wright, one of the conferees on the bill, noted, "[f]or some categories of sources the number of subclasses might be extensive," because of "different processes and products." Leg. Hist. 259. This Court has upheld the use of different regulatory standards for different subcategories in an industry that have different technological and operating characteristics. *Permian Basin Area Rate Cases*, 390 U.S. 747, 784–787.

In setting performance standards for new sources, the Administrator created subcategories reflecting differences among plants relating to such factors as the amount of raw material processed, the types of operations or processes employed, the plant's proximity to population or processing centers, and the rate of production. For example, he established different standards for the manufacture of chlorine and sodium or potassium hydroxide by the mercury cell process (40 C.F.R. 415.62, subsection (a)) and by the diaphragm cell process (subsection (b)). He made similar distinctions in standards for numerous other industries and subcategories. See, *e.g.*, 40 C.F.R. 415.165, 417.25, 418.35, 420.15, 424.25, 426.135, 429.15. Small and large plants often are subject to different standards. *E.g.*, 40 C.F.R. 428.55, 428.65, 428.75 (different standards for small, medium-sized, and large rubber plants). See also 40 C.F.R. 419.15(b)(1) (different limitations for each of seven different size categories of petroleum refineries); 40 C.F.R. 425.15. He also made distinctions based on process complexity, 40 C.F.R. 419.15(b)(2), 419.42(b)(3), and the characteristics of process water discharges, 40 C.F.R. 423.15, 40 C.F.R. 419.15(c).

The Act itself makes special provision for flexibility in the application of new source standards for the discharge of heat. The Administrator, or a State with an approved permit program, may adjust the thermal limitations applicable to any new source if its owner or operator establishes that the standard is unnecessary for "the projection [*sic*] and propagation of a balanced, indigenous population of shellfish, fish, and wildlife * * *." Section 316(a), 33 U.S.C. (Supp. V) 1326(a).

In addition to these statutory provisions and regulations, further flexibility in the application of new source performance standards is provided through the Administrator's authority to change the standards to meet changing circumstances and developing technology. Section 306(b)(1)(B), 33 U.S.C. (Supp. V) 1316(b)(1)(B). He can thus modify the requirements for a particular industrial subcategory with particular problems, to reflect changes in the operating practices and technology of that particular segment.

D. The Statutory Provisions Upon Which duPont, *et al.*, Rely Do Not Establish That the Administrator May Grant Variances From the New Source Performance Standards

DuPont, *et al.*, attempt to answer the foregoing arguments by asserting that other provisions of the Act manifest a congressional intent to permit variances from new source standards. They rely on (1) Sections 306(e), 309 and 505, 33 U.S.C. (Supp. V) 1316(e), 1319 and 1365, which provide for federal and citizen enforcement of new source standards directly against new sources that have not obtained a permit; and (2) Section 402(k), 33 U.S.C. (Supp. V) 1342(k), which provides that, for enforcement purposes, compliance with a permit is deemed compliance with Section 306. From these two propositions they conclude that permits may be issued that "override" and supplant the applicable new source

standards (Pet. Br. 6–9). The conclusion is a *non sequitur*.

The fact that new source standards may be directly enforced against new sources that have not obtained a permit sheds no light on whether variances from those standards must be provided in individual permits. The basic congressional plan was that, before beginning to discharge pollutants, new sources would obtain a permit prescribing the maximum amounts of permissible discharge. There would be situations, however, in which a new source might begin to operate without first obtaining a permit. The enforcement provisions upon which duPont, *et al.*, rely were intended to deal with that situation.

As this Court noted in *Environmental Protection Agency* v. *California ex rel. State Water Resources Control Board*, No. 74–1435, decided June 7, 1976, the purpose of Section 402(k) is to accord finality to permits and provide assurance to industry that obtaining a permit will fulfill most of its obligations under the Act. The Administrator is required periodically to reassess and revise the effluent limitations and new source performance standards. Sections 301(d) and 306(b)(1)(B). The reason for Section 402(k) is to insure that, once a point source has obtained a permit– which is deemed compliance with the Act—the Administrator's substantive changes in effluent limitations will not place the permit holder in violation of the Act. Indeed, in the case of new sources, Section 306(d) provides that a new source

built in accordance with the new performance standards will not be subject to more stringent standards for 10 years, even though the term of permits cannot exceed five years. Section 402(b), 33 U.S.C. (Supp. V) 1342(b).

The companies also argue that because the Environmental Protection Agency may be subject to the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. 4321 *et seq.*, in the issuance of permits to new sources, its environmental assessment under that Act will provide a "good factual basis for adjusting a new source standard to obtain particular limitations for an individual plant" (Br. 9). But whether it would or not [13] is irrelevant to the question in this case: whether the Federal Water Pollution Control Act requires the Administrator to permit individual variances from the uniform standards for new sources. As we have shown, the reconsideration of those standards in their application to individual plants that the companies urge is precisely what Congress wished to avoid.

CONCLUSION

The judgment of the court of appeals should be reversed insofar as it set aside the new source regulations because of their failure to provide any variance provisions and remanded the case to the Administrator to provide "some limited escape mechanism for new

[13] Section 511(c)(2)(B), 33 U.S.C. (Supp. V) 1371(c)(2)(B), in fact bars reliance on NEPA to alter effluent limitations.

sources" (A. 263). In all other respects the judgment should be affirmed (see nn. 2 and 3, *supra*, and the Administrator's brief in No. 75–978).

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
PETER R. TAFT,
Assistant Attorney General.
DANIEL M. FREIDMAN,
Deputy Solicitor General.
HOWARD E. SHAPIRO,
Assistant to the Solicitor General.
EDMUND B. CLARK,
KATHRYN A. OBERLY,
Attorneys.

G. WILLIAM FRICK,
General Counsel,
ALAN W. ECKERT,
Deputy Associate General Counsel,
Environmental Protection Agency.

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